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EVALUATING NEW YORK'S NOTICE OF CLAIM REQUIREMENTS: WHY NAMING INDIVIDUAL MUNICIPAL EMPLOYEES IS NOT ESSENTIAL

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INTRODUCTION

In New York, individuals who wish to bring an action against a municipality must file a notice of claim.[1] A notice of claim serves the important function of enabling municipalities to investigate claims against them.[2] More specifically, it aids municipalities in their ability to "locate the place, fix the time and understand the nature of the accident" while information is still available.[3] However, it is currently unclear what exactly is required in a notice of claim.[4] Courts are split as to whether a plaintiff must name individual municipal employees in a notice of claim in order to maintain a subsequent action against them, or if a notice of claim is sufficiently filed without naming individual defendants.[5] This issue carries significant consequences for plaintiffs in municipal tort lawsuits, as failure to comply with notice of claim requirements can result in dismissal of a plaintiff's claim.[6]

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[1] New York State Unified Court System, *Filing a Notice of Claim* 1 http://www.nycourts.gov/courts/6jd/forms/srforms/ntc_howto.pdf.

[2] *See* Brown v. City of New York, 95 N.Y.2d 389, 393, 740 N.E.2d 1078, 1080, 718 N.Y.S.2d 4, 6 (2000).

[3] *Id.*

[4] *See* discussion *infra* Part II.

[5] *See* discussion *infra* Part II.

[6] *See* New York State Unified Court System, *supra* note 1.

For example, in September of 2008, Jose Alvarez brought an action against the New York Police Department ("NYPD") alleging that he was subjected to, among other things, false arrest.[7] In his notice of claim directed towards the City of New York and the NYPD, he did not name any of the individual police officers involved in the incident.[8] As a result, the court dismissed Alvarez's claim against the officers.[9] Similarly, in October of 2008, Tyrone Blake and Dwayne Johnson brought several causes of action against the NYPD, including false arrest, and failed to name any NYPD officers in their notice of claim.[10] The court here, in contrast to *Alvarez*, did not dismiss Blake and Johnson's action against individual officers, despite their failure to name officers in their notice of claim.[11] Thus, while failure to name NYPD officers was of no consequence for Blake and Johnson, the omission of individual defendants' names was fatal to Alvarez's lawsuit against the employees.

In March of 2013, the Fourth Department created a department split with the First Department on the issue of whether individual employees must be named in a notice of claim.[12] In *Goodwin v. Pretorius*, the Fourth Department held that New York General Municipal Law § 50-e does not mandate that individual employees be named in a notice of claim.[13] The Fourth Department departed from precedent in determining that the text and purpose of the statute compel this conclusion.[14] On the other hand, in 2006, the First Department asserted that individual municipal employees must be named in a notice of claim in *Tannenbaum v. City of New York*.[15]

This Note argues that the approach adopted by the Fourth Department in *Goodwin*—that General Municipal Law § 50-e does not require the naming of individual municipal employees—is the correct approach in terms of the text of the statute and the

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[7] Alvarez v. City of New York, 134 A.D.3d 599, 599, 22 N.Y.S.3d 362, 362 (1st Dep't 2015).

[8] *Id.* at 599–600, 22 N.Y.S.3d at 362.

[9] *Id.* at 606–07, 22 N.Y.S.3d at 367.

[10] Blake v. City of New York, 148 A.D.3d 1101, 1102–05, 51 N.Y.S.3d 540, 542–44 (2d Dep't 2017).

[11] *Id.* at 1106, 51 N.Y.S.3d at 545.

[12] *See* discussion *infra* Part II.B.

[13] Goodwin v. Pretorius, 105 A.D.3d 207, 216, 962 N.Y.S.2d 539, 546 (4th Dep't 2013).

[14] *Id.* at 210–16, 962 N.Y.S.2d at 542–46.

[15] Tannenbaum v. City of New York, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, 5–6 (1st Dep't 2006).

purpose behind the statute, as well as policy and practical implications. This Note is comprised of four parts. Part I illustrates the importance of the notice of claim requirement and introduces the text of New York General Municipal Law § 50-e(2). Part II provides a synopsis of the case law on both sides of this issue, in both New York State courts and federal courts interpreting New York law. Part III analyzes why the *Goodwin* approach is preferable to the *Tannenbaum* approach based on the text of the statute, the purpose behind it, and various policy and practical outcomes. Part IV evaluates a proposed amendment to the statute that attempts to strike a balance between the two views and explains why it does not efficiently solve the naming requirement issue. For a variety of reasons, New York and federal courts should adopt the *Goodwin* approach going forward.

I. THE NOTICE OF CLAIM REQUIREMENT IN NEW YORK

A. The Importance of the Notice of Claim Requirement

The costs associated with personal injury lawsuits against municipalities, particularly New York City, have serious implications for municipalities and individual citizens.[16] New York City directs a significant amount of financial resources towards personal injury lawsuits.[17] The expenses accompanying trial, settlement fees, and other costs of legal work are, as a general trend, increasing.[18] Tort lawsuits have cost municipalities billions, from sidewalk slip-and-falls to high-profile incidents of police brutality.[19] For example, New York

[16] *See infra* notes 17–25 and accompanying text.

[17] John P. Avlon, *Sue City*, FORBES (July 14, 2009), https://www.forbes.com/2009/07/14/new-york-city-tort-tax-opinions-contributors-john-p-avlon.html ("New York now allocates more taxpayer dollars to settling personal-injury lawsuits than it does to parks, transportation, homeless services or the City University system.").

[18] *See id.* ("the average settlement [as of 2009] was nearly $75,000–up from $14,396 in 1984"). *But see* Dan Rivoli & Reuven Blau, *NYC Transit paid $431M to settle lawsuits*, N.Y. DAILY NEWS (Sept. 26, 2016), http://www.nydailynews.com/new-york/nyc-transit-paid-431m-settle-injury-lawsuits-article-1.2806066 ("the amount of money doled out due to lawsuits dropped by 13.2% . . . [in 2015], from $99.8 million in 2014 to $86.6 million in 2015 . . . [i]t was the first time since 2012 that the figure dropped, records show.").

[19] Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015), https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834 ("The 10 cities with the largest police departments paid out $248.7 million . . . in settlements and court judgments in police-misconduct cases [in 2014], up 48% from $168.3 million in 2010"); Elizabeth

City compensated tort victims approximately $431 million between 2010 and 2015 solely to settle lawsuits from people injured by Metropolitan Tranportation Authority trains or buses.[20] As a result, the cost of handling personal injury lawsuits against a municipality falls, in some part, on the individual taxpayer.[21] Additionally, increased costs of litigation may stifle a plaintiff's desire to bring a tort lawsuit.[22]

Even acknowledging a recent decline in tort lawsuits over the last three years,[23] it is likely that tort lawsuits will continue to have similar implications for municipalities and individuals going forward, particularly in New York City.[24] Millions of commuters travel into and out of New York City each day,[25] exposing an enormous population to the possibility of negligence. For better or worse, tort lawsuits have an impact on both municipalities and their local communities.[26]

In light of the costs associated with tort claims and the never-ending potential for individuals to bring a tort action, it is important to recognize the difficulties that municipalities face in defending against these lawsuits. A notice of claim, which supplies municipalities with the information needed to timely assess claims against them,[27] is of great importance. Without

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Kolbert, *Metro Matters; A Map to Suing the City, or 6,000 Pages on the Sidewalks of New York*, N.Y. TIMES (Apr. 20, 1998), http://www.nytimes.com/1998/04/20/nyregion/metro-matters-a-map-to-suing-the-city-or-6000-pages-on-the-sidewalks-of-new-york.html ("[e]very year, the city is sued for billions of dollars and winds up paying hundreds of millions in settlements," including sidewalk injuries); *see also* Avlon, *supra* note 17 ("[s]idewalk 'slip-and-falls' cost taxpayers $54 million" in 2008).

[20] Rivoli & Blau, *supra* note 18.

[21] *Lawsuit Lottery: Report Says New York's Lawsuit Industry Costs Billions, Distorts Justice*, THE BUS. COUNCIL OF N.Y. ST., INC. (Mar. 25, 1998), http://www.bcnys.org/whatsnew/1998/acciddrm.htm (As of 1998, municipal lawsuits of all kinds cost New York taxpayers "$14 billion each year, or almost $800 per person.").

[22] Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, WALL ST. J. (July 24, 2017), https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572 (finding that tort lawsuits have declined because of the increasing cost of bringing lawsuits, among other factors).

[23] *Id.*

[24] *See* Kolbert, *supra* note 19 ("[I]t is hard to imagine how all the defects noted by Big Apple could be addressed.").

[25] *See* Press Release, United States Census Bureau, *Census Bureau Reports 1.6 Million Workers Commute into Manhattan Each Day* (Mar. 5, 2013) (available at https://www.census.gov/newsroom/press-releases/2013/cb13-r17.html).

[26] *See supra* notes 17–25 and accompanying text.

[27] *See* discussion *infra* Part III.B.

such a requirement, a municipality would struggle to promptly discover the details of allegations against it,[28] and be burdened by potentially unlimited liability.

B. The Text of New York General Municipal Law § 50-e(2)

With these implications in mind, the way in which plaintiffs initiate actions against government entities is a critical first step in the process of a lawsuit.

> Anyone who wishes to commence a civil lawsuit against New York State, . . . local government (county, city, town, village) or most government agencies for damages because of certain alleged conduct or negligence must first file with the State or municipal government agency a document known as a Notice of Claim . . . .[29]

New York General Municipal Law § 50-e requires that a notice of claim be filed within ninety days after a tort claim arises.[30]

There is a debate in New York State courts as to what must be included in a notice of claim, and more specifically, "whether a plaintiff is required to name individual municipal employees in a notice of claim in order to maintain a subsequent action against those employees."[31] New York General Municipal Law § 50-e(2) mandates the following regarding the contents of a notice of claim:

> The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable . . . .[32]

Although the requirements may seem straightforward, some courts have required that plaintiffs name individual municipal employees in a notice of claim, while most courts have not.[33] Compliance with notice of claim requirements is imperative for a plaintiff; failure to meet the requirements typically results in

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[28] *See* discussion *infra* Part II.A.

[29] New York State Unified Court System, *supra* note 1.

[30] N.Y. GEN. MUN. LAW § 50-e (McKinney 2018).

[31] Kennedy v. Arias, No. 12 Civ. 4166 (KPF), 2017 WL 2895901, at *12 (S.D.N.Y. July 5, 2017).

[32] N.Y. GEN. MUN. LAW § 50-e.

[33] *See Kennedy*, 2017 WL 2895901, at *12–13.

dismissal of the case.[34] Thus, this split in New York authority and in federal courts interpreting New York law presents an issue of vital importance to plaintiffs in municipal tort lawsuits.[35]

II. CASE LAW ADDRESSING NAMING INDIVIDUAL DEFENDANTS IN A NOTICE OF CLAIM

A. When Naming of Individual Defendants Has Been Required in a Notice of Claim

Courts that have held that individual defendants must be named in a notice of claim have done so primarily because the result is consistent with the overall purpose of General Municipal Law § 50-e.[36] The fundamental purpose of a notice of claim is to provide a municipality with the ability to assess the merits of a claim against it.[37] A notice of claim featuring the names of individual defendants allows a municipality to timely investigate the circumstances surrounding a lawsuit before conditions change, and while resources such as witnesses are still available.[38] Thus, an adequate notice of claim, including the names of individual defendants, serves to limit the prejudice that a municipality would otherwise experience through a delay in investigation.[39] Additionally, the holding has been supported using textualist and plain meaning principles.[40]

1. New York State Courts Interpreting General Municipal Law § 50-e(2)

Some New York courts have held that individual municipal employees must be named in a notice of claim, and failure to name individual defendants will lead to dismissal of an action against them.[41] *White* was the first New York case that dismissed a plaintiff's cause of action against individual municipal employees due to a failure to name those employees in a notice of claim.[42] In that case, the court firmly rejected the

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[34] *See* New York State Unified Court System, *supra* note 1.
[35] *See* discussion *infra* Part II.
[36] *See* discussion *infra* Parts II.A.I and II.A.2.
[37] *See* discussion *infra* Part III.B.
[38] *See infra* note 129 and accompanying text.
[39] *See* discussion *infra* Parts II.A.I and II.A.2.
[40] *See infra* notes 44–46 and accompanying text.
[41] *See* discussion *infra* Parts II.A.I and II.A.2.
[42] *See generally* White v. Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641 (Sup. Ct. Rensselaer Cty. 2003).

contention that a student's parents could file a notice of claim against a school district, without identifying school district employees, and maintain a subsequent action against those employees in their individual capacities.[43]

First, the court in *White* began by looking at the statutory text and utilizing a "plain meaning" approach.[44] Nothing in General Municipal Law § 50-e expressly permits directing a notice of claim at a municipality and subsequently bringing an action against a separate entity.[45] The court reasoned that "[General Municipal Law § 50-e] certainly does not authorize actions against individuals who have not been individually named in a notice of claim."[46]

Further, the court in *White* stated that the plaintiff's argument was "inconsistent with the notice of claim's acknowledged purpose of affording the public corporation the opportunity to not only locate the defect, [and] conduct a proper investigation, but also to assess the merits of the claim."[47] Referring to the statute's purpose, the court emphasized that failure to name individual employees does not provide "enough information to enable the municipality to adequately investigate the claim."[48] The court held that "[w]here the notice of claim fails to . . . set forth a theory for imposing individual liability on that employee, the municipality has no basis for investigating whether or not the claimant has a valid claim against that employee."[49]

Moreover, despite the plaintiff's contention that the school district conducted a thorough investigation as a result of the notice of claim and became aware of their employee's actions, the school's actions did not excuse plaintiff's failure to comply with

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[43] *Id.* at 410, 759 N.Y.S.2d at 643.

[44] *Id.* at 411, 759 N.Y.S.2d at 644 (internal quotation marks omitted).

[45] *Id.*, 759 N.Y.S.2d at 644.

[46] *Id.*, 759 N.Y.S.2d at 644.

[47] *Id.*, 759 N.Y.S.2d at 644 (citing Carhart v. Vill. of Hamilton, 190 A.D.2d 973, 974, 594 N.Y.S.2d 358 (3d Dep't 1993)).

[48] *Id.*, 759 N.Y.S.2d at 644 (citations omitted). The court held it was "well established" that any claim of liability not put forth in a notice of claim could not be maintained in a subsequent lawsuit. *Id.*, 759 N.Y.S.2d at 644.

[49] *Id.* at 412, 759 N.Y.S.2d at 644. The court concluded by saying, "[t]hus, permitting plaintiffs to prosecute causes of action against individuals who were not named in their notice of claim is contrary both to the letter and the purpose of the statute." *Id.*, 759 N.Y.S.2d at 644.

the notice of claim requirements.[50] Ultimately, based on both the text and purpose of the statute, the court granted the individual defendant's motion to dismiss.[51]

The first time the *White* approach was cited at the appellate level was in *Tannenbaum*.[52] In that case, the plaintiff alleged tort and federal civil rights claims against public officers and district attorneys.[53] The *Tannenbaum* court affirmed the trial court's dismissal of the tort claims, which required an adequate notice of claim pursuant to General Municipal Law § 50-e.[54] Citing to *White*, the court simply held that "General Municipal Law § 50–e makes unauthorized an action against individuals who have not been named in a notice of claim."[55] Although *Tannenbaum* did not provide an extensive rationale for its holding, it has been interpreted as an adoption of the holding in *White* by the First Department. Many trial courts and the First Department have cited to *White* and *Tannenbaum* for the proposition that individual municipal employees must be named in a notice of claim.[56]

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[50] *Id.*, 759 N.Y.S.2d at 645 ("The school district's efforts to investigate the plaintiffs' claims cannot serve as a substitute for compliance with . . . General Municipal Law § 50–e.").

[51] *Id.* at 413, 759 N.Y.S.2d at 645–46. Moreover, "plaintiffs provide[d] no excuse for their failure to include the individual defendants in their notice of claim . . . ." *Id.,* 759 N.Y.S.2d at 645–46.

[52] Tannenbaum v. City of New York, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, 5 (1st Dep't 2006).

[53] *Id.* at 358–59, 819 N.Y.S.2d at 5–6.

[54] *Id.* at 358, 819 N.Y.S.2d at 5.

[55] *Id.*, 819 N.Y.S.2d at 5 (citing *White*, 195 Misc. 2d at 411, 759 N.Y.S.2d at 641).

[56] *See* Goodwin v. Pretorius, 105 A.D.3d at 217 n.1, 962 N.Y.S.2d at 546 n.1 (4th Dep't 2013); Cleghorne v. City of New York, 99 A.D.3d 443, 446, 952 N.Y.S.2d 114, 117 (1st Dep't 2012) (holding that the trial court should have dismissed a complaint against two school principals entirely because the individual defendants were not named pursuant to General Municipal Law § 50-e and *Tannenbaum*). Flowers v. City of New York, 53 Misc. 3d 922, 933, 41 N.Y.S.3d 360 (Sup. Ct. N.Y. Cty. 2016) (holding that an arrestee's action against individual police officers must be dismissed due to failure to comply with General Municipal Law § 50-e); Almas v. P.O. Fernando Loza, No. 112379/07, 2011 WL 5118136 (Sup. Ct. N.Y. Cty. May 21, 2011) (citing to *Tannenbaum* in holding that "General Municipal Law § 50-c [sic] makes unauthorized an action against individuals who have not been named in a notice of claim . . . ."); Guzman v. The City of New York, No. 100314/09, 2011 WL 1360334 (Sup. Ct. N.Y. Cty. Apr. 1, 2011) (citing to *Tannenbaum* in holding that "[t]he notice of claim must identify any City employee against which a plaintiff intends to bring a cause of action, and the failure to do so requires dismissal of the cause of action"); Martire v. City of New York, No. 106827/2008, 2009 WL 2350276 (Sup. Ct. N.Y. Cty. July 20, 2009) (preventing an action from proceeding against a police officer who was not individually named in a notice of claim).

More recently, in *Alvarez v. City of New York*,[57] the First Department reiterated the policies of the *Tannenbaum* holding, finding the reasoning in *White* more persuasive than approaches followed by the Third and Fourth Departments.[58] In that case, Alvarez brought an action against the NYPD for false arrest; however, his notice of claim "did not specifically name any members of the NYPD responsible for these alleged acts, nor did they contain a generic reference to individual officers such as 'Police Officer John Doe' or any similar language indicating that plaintiffs were making a claim against any police officers individually."[59] Citing to *Tannenbaum* and its progeny, a plurality authored by Justice Sweeney indicated that "[t]he ability to 'assess the merits of the claim' is one of the key reasons for the requirement of a notice of claim."[60] The court noted that although a municipality may have adequate knowledge of the events, the same holds true for the plaintiff, and a plaintiff's statutory duties should not be disregarded.[61] Because more individual defendants were added over time, as had happened in *Tannenbaum*, the City was unable to launch a timely investigation.[62] This court expressed its concerns by allowing the action to proceed:

> To permit such a result raises questions of fundamental fairness for the individual defendants, since they were not put on notice, even in a generic way by way of "Police Officer John Doe" or similar language, that they were going to become defendants. Moreover, the prejudice accruing to both the municipal and

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[57] 134 A.D.3d 599, 22 N.Y.S.3d 362 (1st Dep't 2015).

[58] *Id.* at 600–04, 22 N.Y.S.3d at 362–66. The court distinguished *Alvarez* from three cases cited by the dissent as inapplicable, unpersuasive precedent, or both. *Id.*, 22 N.Y.S.3d at 362–66. First, the court distinguished the facts of *Alvarez* from Brown v. City of New York, 95 N.Y.2d 389, 740 N.E.2d 1078, 718 N.Y.S.2d 4, as that case concerned a "defective sidewalk and curb" and did not require the naming of individual defendants. Second, the court distinguished Pierce v. Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321 (3d Dep't 2015), as the plaintiff in that case had knowledge of the individual defendant's name yet inexplicably omitted the name in her notice of claim. Additionally, the court treated the Third Department's holding as persuasive precedent and did not feel obligated to follow *Pierce*. Similarly, the court did not feel obligated to follow *Goodwin*, 105 A.D.3d 207, 962 N.Y.S.2d 539, a case dealing with medical malpractice. Moreover, the court noted that although service of the notice of claim on an employee is waived by statute, failure to name an individual defendant is not waived, as *Goodwin* suggested. *Goodwin* "did not explain how a municipality can undertake an adequate and timely investigation . . . ."

[59] *Alvarez*, at 599–600, 22 N.Y.S.3d at 362.

[60] *Id.* at 604, 22 N.Y.S.3d at 366 (Sweeney, J., concurring).

[61] *Id.* at 605, 22 N.Y.S.3d at 366.

[62] *Id.* at 606, 22 N.Y.S.3d at 367.

> individual defendants from such a delay is obvious, since memories fade over time, records that could have been easily obtained early on have been archived, lost or discarded, and witnesses may have relocated, just to name a few of the potential obstacles. Delay in investigation and evaluating a claim defeats the purpose of GML § 50-e.[63]

Thus, the court in *Alvarez* adhered to the precedent set forth in *Tannenbaum*.

In dissent, Justice Manzanet-Daniels suggested that the statute's text does not explicitly require naming individual defendants.[64] Acknowledging the reasoning from the Third and Fourth Departments, the dissent asserted that the purpose of the statute may be served absent the naming of individual officers.[65] Moreover, the dissent implied that the defendants were in no way hindered from investigating the claims.[66] Justice Manzanet-Daniels also cautioned that the court "must not be loath to depart from precedent where it cannot be reconciled with the plain meaning and purpose of a statute . . . [the court] ought not to impose judicially a requirement that is nowhere to be found in the statute."[67] One justice concurred in the opinion, conceding that while the dissent's argument was persuasive, he was constrained by the precedent set forth in *Tannenbaum*.[68]

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[63] *Id.,* 22 N.Y.S.3d at 367.

[64] *Id.* at 608, 22 N.Y.S.3d at 368 (Manzanet-Daniels, J., dissenting). Justice Manzanet-Daniels also disagreed with the plurality's view that because service on individual defendants is not required, naming individual defendants is not required; one could just as easily argue that because there is no service requirement, there is no naming requirement either. *Id.*, 22 N.Y.S.3d at 368.

[65] *Id.* at 609–10, 22 N.Y.S.3d at 369–70.

[66] *Id.* at 608–09, 22 N.Y.S.3d at 369. Particularly in a case involving a false arrest claim, "the municipal defendant is uniquely positioned to know the facts of any such claim—at a minimum, which officers were on duty and in the vicinity." *Id.*, 22 N.Y.S.3d at 369. The officers involved could likely be available to provide information. Moreover, Justice Manzanet-Daniels questioned the plurality's assertion that including "John Doe" language would allow the City to gather information about an incident of alleged false arrest. *Id.*, 22 N.Y.S.3d at 369.

[67] *Id.* at 610, 22 N.Y.S.3d at 370. The dissent wrote that "*Tannenbaum* . . . imposed a requirement for notices of claim that went beyond those enumerated by the General Municipal Law. The requirements for notices of claim are in derogation of a plaintiff's rights and must therefore be strictly construed." *Id.*, 22 N.Y.S.3d at 370.

[68] *Id.* at 607, 22 N.Y.S.3d at 367 (Mazzareli, J., concurring).

2. Federal Courts Interpreting New York Law

In addition to New York State courts, many federal District Courts interpreting New York Law have embraced the approach used by the First Department.[69] For example, in *Rateau v. City of New York*, a plaintiff's state law claims were dismissed after he failed to name a New York City Department of Information and Technology employee in his notice of claim.[70] Similarly, in *Schafer v. Hicksville Union Free School Distict*, the court cited to *White* and *Tannenbaum* in holding that General Municipal Law § 50-e mandates the naming of individual defendants against whom plaintiffs intend to commence a lawsuit.[71] Several other cases from 2011 and 2012 have held consistent with this standard.[72]

Subsequently, in 2014, the Southern District of New York once again held that suits against municipal employees in their individual capacities must be preceded by a notice of claim naming the defendants in order to comply with General Municipal Law § 50-e.[73] Most recently, in May of 2017, in *Johnson v. City of New York*, the court held that, strictly construing notice of claim requirements, plaintiff's false arrest and related claims were to be dismissed for failure to name police department employees.[74] In that case, Plaintiff did not include

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[69] *See* discussion *infra* Part II.A.2.

[70] No. 06–CV–4751 (KAM)(CLP), 2009 WL 3148765, at *15 (E.D.N.Y. Sept. 29, 2009).

[71] No. 06–CV–2531(JS)(ARL), 2011 WL 1322903, at *11 (E.D.N.Y. Mar. 31, 2011) (holding that a lawsuit against school district employees and an educational program's employees had to be dismissed because student's parents failed to name individual defendants in a notice of claim).

[72] Goodwin v. Pretorius, 105 A.D.3d 207, 217 n.1, 962 N.Y.S.2d 539, 546 n.1 (4th Dep't 2013). *See* DC v. Valley Cent. Sch. Dist., No. 7:09–cv–9036 (WWE), 2011 WL 3480389, at *2 (S.D.N.Y. Sept. 30, 2011) (citing to *White* and *Schafer* in holding that a plaintiff could not assert state law claims against school officials because of failure to properly name potential defendants in a notice of claim which must be strictly construed); *see also* Dilworth v. Goldberg, No. 10 Civ. 2224(RJH), 2011 WL 4526555, at *6 (S.D.N.Y. Sept. 30, 2011) (holding that a *pro se* plaintiff's notice of claim was insufficient because even though he did name three of the potential defendants, he failed to assert any theories of individual liability against them); Alexander v. Westbury Union Free Sch. Dist., 829 F. Supp. 2d 89, 110 (E.D.N.Y. 2011) (holding that a school teacher's lawsuit against three individual school district defendants must be dismissed for failure to name individual defendants in her notice of claim).

[73] DiRuzza v. Vill. of Mamaroneck, New York, No. 14 CV 1776(VB), 2014 WL 6670101, at *2–3 (S.D.N.Y. Oct. 6, 2014).

[74] No. 15–cv–8195–GHW, 2017 WL 2312924, at *7 (S.D.N.Y. May 26, 2017).

"even unnamed individual 'John Doe' defendants."[75] Therefore, despite the First Department standing alone as the only appellate court in New York to currently use the approach from *White* and its progeny, many federal courts have embraced the approach originating from *White* as well.[76]

B. When Naming Individual Defendants Has Not Been Required in a Notice of Claim

Courts that have held that naming individual defendants is not required by General Municipal Law § 50-e have done so on various grounds.[77] First, many courts have held that, as a textual matter, the statute does not explicitly mandate or require the naming of individual defendants.[78] Additionally, courts have held that the purpose of the statute can be satisfied absent the naming requirement.[79] Stated otherwise, a municipality can still adequately investigate the merits of a claim against it because of the other requirements imposed by the statute.[80] The approach has been justified on policy grounds as well; for example, the statute should be construed in favor of plaintiffs because the issue concerns a derogation of a plaintiff's common-law rights.[81]

1. New York State Courts Interpreting General Municipal Law § 50-e(2)

Unlike the First Department, most courts deciding this issue have held that failure to name individual municipal employees in a notice of claim is not detrimental to a plaintiff's action against those employees.[82] The controlling case from the Fourth Department, *Goodwin v. Pretorius*, overturned Fourth

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[75] *Id.* Plaintiff in that case argued that the "failure [to name individual defendants] should be excused because only through discovery did Plaintiff learn the identities of the Individual Defendants. However, Plaintiff failed to provide notice of suit against even unnamed individual 'John Doe' defendants, and consequently the City of New York and the Individual Defendants were not on notice of these claims." *Id.* Curiously, the court did not cite to *Goodwin*, *Tannenbaum*, or *White* in its decision.

[76] For the most part, the federal cases that have decided the issue in this way have not provided any substantive or procedural rationale beyond what has already been outlined in the New York State courts.

[77] *See* discussion *infra* Parts II.B.1 and II.B.2.

[78] *See* discussion *infra* Parts II.B.1 and II.B.2.

[79] *See* discussion *infra* Parts II.B.1 and II.B.2.

[80] *See* discussion *infra* Parts II.B.1 and II.B.2.

[81] *See infra* note 88 and accompanying text.

[82] *See* discussion *infra* Parts II.B.I and II.B.2.

Department precedent and created a department split in holding that individual municipal employees do not have to be identified in a notice of claim.[83] The court in *Goodwin* sharply disagreed with the decision of the Renssealaer County Supreme Court in *White*, calling the decision "devoid of any legal authority."[84] Examining the importance of the doctrine of *stare decisis*, the court nevertheless noted that "[*stare decisis*] does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason."[85] Even in cases of statutory interpretation, in which precedents are "entitled to great stability," the court concluded that precedent may be justifiably overruled when a requirement has been judicially created and "goes beyond those requirements set forth in the statute."[86] Because the statute does not require naming individual defendants, while enumerating other specific requirements, one must infer that naming individual defendants was intentionally omitted from the statute's requirements.[87]

Moreover, the court in *Goodwin* reasoned that because the notice of claim requirement at issue involves a "'derogation of [a] plaintiff's common-law rights,' the statute creating such a requirement should be strictly construed in the plaintiff's favor."[88] Furthermore, the court looked to language from the New York Court of Appeals in determining that "[t]he underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers, or employees in the notice of claim."[89]

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[83] 105 A.D.3d 207, 213–16, 962 N.Y.S.2d 539, 543–44 (4th Dep't 2013). *Goodwin* overruled Cropsey v. County Of Orleans Industrial Development Agency. Cropsey v. Cty. Of Orleans Indus. Dev. Agency, 66 A.D.3d 1361, 886 N.Y.S.2d 290 (4th Dep't 2013).

[84] *Goodwin*, 105 A.D.3d at 211, 962 N.Y.S.2d at 542.

[85] *Id.* at 215, 962 N.Y.S.2d at 545 (quoting Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc., 61 A.D.3d 146, 150, 873 N.Y.S.2d 819 (4th Dep't 2009)). The court further stated that "in such cases it is the duty of the courts to re-examine the question." *Id.*, 962 N.Y.S.2d at 545.

[86] *Id.*, 962 N.Y.S.2d at 545.

[87] *See id.* at 216, 962 N.Y.S.2d at 546.

[88] *Id.*, 962 N.Y.S.2d at 546 (quoting Sandak v. Tuxedo Union Sch. Dist. No. 3, Town of Tuxedo, 308 N.Y. 226, 230, 124 N.E.2d 295 (1954)).

[89] *Id.*, 962 N.Y.S.2d at 546 (citing Brown v. City of New York, 95 N.Y.2d 389, 393, 740 N.E.2d 1078, 1080, 718 N.Y.S.2d 4, 6 (2000)).

Subsequently, the Third Department in *Pierce v. Hickey* followed *Goodwin* in holding that a motorist was not required to name a county machine equipment operator in order to maintain a subsequent action against him.[90] The court in *Pierce* held that General Municipal Law § 50-e simply does not require that an individual employee be named in a plaintiff's notice of claim.[91] Dismissal of the complaint was not warranted because, as annunciated in *Goodwin*, the purpose of the statute can be satisfied absent naming individual defendants.[92]

Additionally, in the recent case of *Blake v. City of New York*, the Second Department agreed with the Third and Fourth Departments after recognizing a split in authority.[93] After an analysis of cases including *Alvarez*, *Goodwin*, and *Pierce*, the court simply concluded that "[l]isting the names of the individuals who allegedly committed the wrongdoing is not required [by the statute]."[94] Most recently, in *Williams v. City of New York*, the Second Department cited to *Blake* as applicable precedent after acknowledging a split in authority.[95] Thus, a majority of the New York appellate authority, the Second, Third, and Fourth Departments, agree that naming municipal employees is not required in a notice of claim to maintain a subsequent action against the individuals as defendants.

2. Federal Courts Interpreting New York Law

Many federal district courts have agreed with the interpretation of General Municipal Law § 50-e adopted by the Second, Third, and Fourth Departments.[96] For example, in *Chamberlain v. City of White Plains*, the Southern District of New York adopted "the *Goodwin* Court's well-reasoned conclusion that there is no requirement that individual defendants be specifically named in the notice of claim."[97] In that case, the estate of a deceased individual brought an action as a

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[90] Pierce v. Hickey, 129 A.D.3d 1287, 1288–89, 11 N.Y.S.3d 321, 322–23 (3d Dep't 2015).

[91] *Id.,* 11 N.Y.S.3d at 322–23.

[92] *Id.* at 1289, 11 N.Y.S.3d at 323.

[93] Blake v. City of New York, 148 A.D.3d 1101, 1105–06, 51 N.Y.S.3d 540, 544–45 (2d Dep't 2017).

[94] *Id.* at 1106, 51 N.Y.S.3d at 545.

[95] Williams v. City of New York, 153 A.D.3d 1301, 1305, 62 N.Y.S.3d 401, 406 (2d Dep't 2017).

[96] *See* discussion *infra* Part II.B.2.

[97] 986 F. Supp. 2d 363, 397 (S.D.N.Y. 2013).

result of a fatal injury during a police encounter, yet did not name individual police officers in a notice of claim.[98] Since the notice of claim allowed the City to conduct an adequate investigation by describing "the specific, date, time, and address of the incident," as well as the alleged facts, "[i]t would then have been a straightforward inquiry for the City to determine which individuals had been dispatched . . . ."[99] Referring to the extensive rationale behind *Goodwin*, the notice of claim allowed the City to conduct a thorough investigation; thus, the court concluded the plaintiff's estate should not be penalized pursuant to General Municipal Law § 50-e.[100] Similarly, in *Reyes v. City of New York*, the Southern District of New York predicted that the New York Court of Appeals would follow *Goodwin* based on the court's analysis in *Chamberlain*.[101]

Federal courts in 2018 have continued to wrestle with this issue.[102] As a general trend, federal cases decided after *Goodwin* have most commonly found that failure to name individual defendants in a notice of claim does not warrant dismissal of a plaintiff's action.[103] For example, in the recent case of *Russell*,[104] the Southern District held that failure to name individual defendants did not constitute sufficient grounds for dismissal of a plaintiff's action.[105] In December of 2017 and March of 2018, the Southern District of New York continued to embrace the approach from cases such as *Goodwin* and *Pierce*, determining

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[98] *Id.* at 373–78, 396.

[99] *Id.* at 397.

[100] *Id.*

[101] 992 F. Supp. 2d 290, 301–02 (S.D.N.Y. 2014).

[102] *See* Kennedy v. Arias, No. 12 Civ. 4166 (KPF), 2017 WL 2895901, at *12–13 (S.D.N.Y. July 05, 2017) (recognizing a split in New York appellate authority and Federal Court rulings, yet "refrain[ing] from entering the fray given that Plaintiff's state-law claims for assault and battery fail on separate grounds").

[103] *See* Matthews v. City of New York, No. 15–CV–2311 (ALC), 2016 WL 5793414, n.5 (S.D.N.Y. Sept. 30, 2016); *see also* Kennedy v. City of Albany, No. 15–CV–009491(MAD), 2015 WL 6394513, at *4 (N.D.N.Y. Oct. 22, 2015) (estimating that the Court of Appeals would find that "individually named officers are not required in the notice of claim . . . where the language of the statute does not require it" and the purpose of the statute can be served absent the requirement); *see also* Bah v. City of New York, No. 13 Civ. 6690(PKC)(KNF), 2014 WL 1760063, at *9–12 (S.D.N.Y. May 1, 2014) (agreeing with *Chamberlain* and *Reyes* in determining that the Court of Appeals would likely adopt *Goodwin*, and holding that a notice of claim "contained sufficient detail to allow the City to investigate the claim and ascertain the identities of John Doe officers").

[104] Russell v. Westchester Cmty. Coll., No. 16–CV–1712(KMK), 2017 WL 4326545, at *12 (S.D.N.Y. Sept. 27, 2017).

[105] *Id.*

that the New York Court of Appeals would be unlikely to adopt the requirement promulgated by the First Department.[106] Thus, although many federal cases have held to the contrary, the greater weight of the more recent federal cases interpreting New York law aligns with the Second, Third, and Fourth Departments.

III. NEW YORK SHOULD ADOPT THE *GOODWIN* APPROACH

The approach adopted by the Second, Third, and Fourth Departments is not only preferable to the First Department's approach, but also brings about a preferable outcome on various grounds. First, the *Goodwin* approach is a proper reading of the text of General Municipal Law § 50-e as a matter of statutory interpretation. Second, the purpose of the statute can be fulfilled absent the naming of individual defendants. Third, the *Goodwin* approach promotes desirable policy outcomes, namely fairness and protection of a plaintiff's rights. Lastly, the *Goodwin* approach results in better practical implications for New York's notice of claim requirements. Although there are certainly valid arguments in favor of the *Tannenbaum* approach, the *Goodwin* reading of General Municipal Law § 50-e is, overall, the approach that should be adopted by New York and federal courts going forward.

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[106] *See* Garcia v. Cty. of Westchester, No. 11-CV-7258 (KMK), 2017 WL 5633163, at *28 (S.D.N.Y. Dec. 12, 2017) (holding that "[i]n light of the fact that three out of the four New York appellate departments have declined to require plaintiffs to specifically name each individual defendant as a respondent in the notice of claim, and in light of the New York Court of Appeals' directive that '[t]he test of the sufficiency of a [n]otice of [c]laim is merely whether it includes information sufficient to enable the city to investigate' and that '[n]othing more may be required,' . . . the Court concludes that the requirement imposed by the First Department to specifically name each individual defendant as a respondent in the notice of claim is unlikely to be adopted by the New York Court of Appeals"). The court in *Garcia* also noted with regards to that case that the "notice of claim made clear that it was Officer Hess who fired into the windshield of Henry's vehicle, and there can be little question that the Village of Pleasantville had ample notice of the need to investigate the conduct of Officer Hess." *Id.*; *see also* Joseph v. Deluna, No. 15-CV-5602 (KMW), 2018 WL 147398, at *6 (S.D.N.Y. Mar. 23, 2018).

A. *Interpreting the Text of General Municipal Law § 50-e(2): the* Goodwin *Approach is the Correct Reading*

When trying to discern the meaning of a statute, the first place to start is the text of the statute itself.[107] One would surely look to the text of General Municipal Law § 50-e(2), entitled "Form of notice; contents," in determining what must be included in a notice of claim.[108] As mentioned in Part I, the section enumerates four requirements: "(1) the name . . . of each claimant . . . ; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained . . . ."[109]

Many courts have accepted the proposition that the text of the statute simply does not require the naming of individual defendants, and therefore a plaintiff's claim is not necessarily insufficient merely because individual defendants were not named.[110] After reading the statute, it would seem apparent that these courts, which have embraced the *Goodwin* approach, are correct. The statute does not require the naming of individual defendants on its face. Stated otherwise, nothing in General Municipal Law § 50-e compels a plaintiff to name individual municipal employees in a notice of claim. While *White*, *Tannenbaum* and other courts have read this requirement into the statute, it is simply absent from the statute's text.

Moreover, not only does the statute omit language regarding the naming of individual defendants, if taken in conjunction with the fact that the statute contains other requirements, a powerful inference can be drawn. McKinney's Consolidated Laws of New York Annotated Statutes § 240 reads, "*expressio unius est exclusio alterius* is applied in the construction of statutes . . . where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."[111] In other words, if the legislature mentions items A, B, and C of a particular category, it may be

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[107] The Writing Center at Georgetown University Law Center, *A Guide to Reading, Interpreting and Applying Statutes* (2017), http://kacca.org/wp-content/uploads/2018/03/A-Guide-to-Reading-Interpreting-and-Applying-Statutes.pdf.

[108] N.Y. GEN. MUN. LAW § 50-e (McKinney 2018).

[109] *Id.*

[110] *See* discussion *supra* Part II.B.

[111] N.Y. STATUTES LAW § 240 (McKinney 2018).

inferred that the legislature did not intend to include related items D, E, and F.[112] Numerous cases in New York State courts have cited to § 240 in interpreting the meaning of legal text.[113] Indeed, *Goodwin* addressed this reasoning in one sentence citing to a New York Court of Appeals case that quoted § 240.[114]

Expressio unius is a canon of negative implication: "[w]ords omitted may be just as significant as words set forth."[115] This principle of interpretation is intuitive and generally describes how people, as well as lawmakers, convey ideas.[116] Applied to General Municipal Law § 50-e, there is a strong inference to be drawn that the New York legislature did not intend to include the naming of individual defendants in a notice of claim. If the New York legislature wanted the names of individual municipal employees to be included in the statute, they likely would have included such a requirement alongside the other enumerated requirements.

The *expressio unius* canon is not without its limitations, as well as some healthy criticism. For example, this principle is heavily dependent on context, and applies when the category being specified "can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved."[117] Moreover, the principle has been criticized as unreliable for relying on a false assumption that the legislature considered all possible items to be included; legislators and others may not think in such precise terms when drafting statutory language.[118]

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[112] *See id.*

[113] *See id.*; *see, e.g.*, Buholtz v. Rochester Tel. Corp., 65 Misc. 2d 1071, 319 N.Y.S.2d 202 (3d Dep't 1971) (contemplating whether Section 27 of the Transportation Corporations Law implied that telephone companies were restricted from installing underground lines under private property without an owner's consent, because the statute permits the installation of lines under public land yet excludes such language when referring to private property).

[114] Goodwin v. Pretorius, 105 A.D.3d 207, 216, 962 N.Y.S.2d 539, 545–46 (4th Dep't 2013) ("It is a well-settled rule of statutory construction that, where as here the statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded") (citing Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York, 41 N.Y.2d 205, 208–209, 391 N.Y.S.2d 544, 546 (1976)) (internal quotation marks omitted).

[115] WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 668–69 (5th ed. 2014); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012).

[116] *See* SCALIA & GARNER, *supra* note 115, at 107–08.

[117] *See id.*, at 107 (emphasis in original).

[118] *See* ESKRIDGE JR. ET AL., *supra* note 115, at 669.

Despite the limitations surrounding *expressio unius*, the canon should still be applied when interpreting General Municipal Law § 50-e(2). "The more specific the enumeration, the greater the force of the canon . . . ."[119] In other words, the more detail that is specified in the statute, the more powerful the inference that what is omitted was intended to be left out. Here, § 50-e(2) requires a claimant's name, the nature of the claim, the time, place, and manner in which the claim arose, as well as the injuries suffered.[120] One can assume that if the statute mandates the inclusion of the claimant's name, the defendant's name, if required, would have been included as well. Further, the nature, time, place, and manner of the claim are indicative of a sophisticated level of detail. This specific level of detail strengthens the notion that defendants' names were intentionally excluded. For example, if the statute merely required "the claimant's name and the details giving rise to the claim," the argument that naming individual defendants is required would be more persuasive because that language would suggest that the legislature did not intend to create an exhaustive list. That is not the case here, as the statute enumerates several requirements. Although utilizing this principle does not provide iron-clad proof as to legislative intent, it is a helpful tool in interpreting the language of the statute.

Moreover, the *White* court's interpretation of the statute—the origin of the *Tannenbaum* approach—is unavailing despite claiming to utilize a "plain meaning" approach.[121] After stating that the statute contains no provision permitting actions against individuals not named in a notice of claim,[122] the court rejected the argument that an action could be brought against school district officials not named in a notice of claim.[123] This reasoning is conclusory and inaccurate. The court in *White* erroneously assumed that because the statute does not expressly authorize a course of action, that course of action must violate the statute.

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[119] *See* SCALIA & GARNER, *supra* note 115, at 108.

[120] N.Y. GEN. MUN. LAW § 50-e (McKinney 2018).

[121] White v. Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 411, 759 N.Y.S.2d 641, 644 (Sup. Ct. Rensselaer Cty. 2003).

[122] *See supra* notes 45–46 and accompanying text.

[123] *See supra* notes 42–46 and accompanying text.

The court in *White* reasoned further that while the statute indicates that service of the notice of claim is not required upon individual employees,[124] no such exception is made for naming individual employees.[125] However, one could just as easily argue the opposite conclusion. Perhaps the statute "dispenses with service on individual actors because the statute does not require that they be named in the notice of claim."[126] Further, the exception that service is not required must be read pursuant to the sentence that immediately follows it, the only other sentence in subsection § 50-e(1)(b). That sentence requires service if the municipality has an obligation to indemnify such person.[127] The provision indicating service is not required was articulated to distinguish typical cases from the instances in which a municipality has an obligation to indemnify a defendant. Thus, a structuralist argument that because the statute excuses service, it should excuse naming of defendants as well is unpersuasive.

From a textualist perspective, the statute does not contain a requirement that individual defendants must be named. Therefore, it would be inappropriate for judges to read in a requirement that is not included in the plain language of the text. This is especially true when the statute enumerates other specific requirements aside from the naming of defendants. If the legislature wants to amend the statute, they are at liberty to do so. However, absent such an amendment of the statute, General Municipal Law § 50-e should not be read to include such a requirement.

B. The Goodwin *Approach is Consistent with the Purpose of General Municipal Law § 50-e(2)*

In addition to the text of General Municipal Law § 50-e, it is helpful to look at the purpose of the statute in evaluating whether naming individual municipal defendants is required.

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[124] N.Y. GEN. MUN. LAW § 50-e ("Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.").

[125] *White*, 195 Misc. 2d at 411, 759 N.Y.S.2d at 644.

[126] Alvarez v. City of New York, 134 A.D.3d 599, 608, 22 N.Y.S.3d 362, 368 (1st Dep't 2015) (Manzanet-Daniels, J., dissenting).

[127] N.Y. GEN. MUN. LAW § 50-e.

Both sides of the debate have cited to a common purpose of the statute, but have arrived at different conclusions in individual cases.[128]

> The purpose of the statute requiring persons seeking to recover in tort against a municipality to serve a notice of claim on the municipality as a precondition to suit is to enable the authorities to investigate, collect evidence and evaluate the merit of a claim while the information is still available and before witnesses depart or conditions change.[129]

When looking to the purpose of New York's notice of claim requirements, one of the leading cases cited to is *Brown v. City of New York*.[130] In that case, concerning a defective sidewalk and curb, the Court of Appeals explained that the notice of claim requirement exists "[t]o enable authorities to investigate, collect evidence, and evaluate the merit of a claim . . . ."[131] Many courts on both sides of the debate have agreed with this acknowledged purpose of the statute.[132] Regarding notice of claim requirements, the Court of Appeals said the following after quoting the language of General Municipal Law § 50-e(2):

> Reasonably read, the statute does not require 'those things to be stated with literal nicety or exactness' . . . [t]he test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate' . . . *'[n]othing more may be required'* . . . in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served

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[128] *See* discussion *supra* Part II.

[129] 62A N.Y. JUR. 2D *Government Tort Liability* § 382 (2018).

> The plain purpose of statutes requiring pre-litigation notice to municipalities is to guard them against imposition by requiring notice of the circumstances upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation. Thus, the requirement furthers the public policy of preventing needless litigation and saving unnecessary expenses by affording an opportunity amicably to adjust claims against public corporations before litigation is commenced.

Id.

[130] 95 N.Y.2d 389, 740 N.E.2d 1078, 718 N.Y.S.2d 4 (2000). *Brown* has been cited by many of the cases discussed herein, including *Alvarez* and *Goodwin*. *See, e.g.*, *supra* notes 58 and 89.

[131] *Brown*, 95 N.Y.2d at 392, 740 N.E.2d at 1079, 718 N.Y.S.2d at 5.

[132] *See* discussion *supra* Part II.

> by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident . . . .[133]

Thus, the Court of Appeals has not only defined the purpose of the statute but spoke directly to the requirements concerning the contents of a notice of claim.[134]

Based on this standard, the purpose of the statute can still be fulfilled under the *Goodwin* approach. Even without the naming of individual defendants, the municipality can adequately investigate the claim pursuant to the statute's other requirements. For example, in an action against a police department and individual police officers, a common suit brought against a municipality, a police department should be able to uncover, through an investigation, which officers are being sued in their individual capacities.[135] A police department can likely determine, based on the time, place, and manner in which the claim arose, which officers could be potentially involved in the claim.[136] Similarly, in a case against a school district and school employees, the school district can likely ascertain, based on the information in the notice of claim, details behind their employees' alleged negligence.[137] Given the other specific notice of claim requirements, it is difficult to imagine a scenario in which failure to name individual defendants would leave a municipality completely in the dark with regards to the claim giving rise to the cause of action. Additionally, "the purpose of the notice of

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[133] *Brown*, 95 N.Y.2d at 393, 740 N.E.2d at 1080, 718 N.Y.S.2d at 6 (emphasis added).

[134] *See id.*; *see also* Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952) ("The prime, if not the sole, objective of the notice of claim requirements of such a statute is to assure the city an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available.").

[135] *See* Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 397 (S.D.N.Y. 2013).

[136] *See id.*

[137] White v. Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 412, 759 N.Y.S.2d 641, 645 (Sup. Ct. Rensselaer Cty. 2003). ("[D]uring the school district's thorough investigation, which continued for months and consisted of numerous witness interviews, the school district learned of the negligence of its employees and hence none of those employees who are named as defendants in this action can claim that they would be prejudiced by not receiving a notice of claim against them within 90 days of the accrual of the plaintiffs' claim . . . ."). *Id.,* 759 N.Y.S.2d at 645 (internal quotation marks omitted). Despite acknowledging this, the court in *White* still concluded that "[t]he school district's efforts to investigate the plaintiffs' claims cannot serve as a substitute for compliance with . . . General Municipal Law § 50-e." *Id.,* 759 N.Y.S.2d at 645.

claim requirement is to notify the municipality, not the individual defendants."[138] Since the purpose behind the law is to enable the municipality to investigate, and nothing more may be required,[139] it does not follow that the individual employees must be put on notice as well.

Moreover, the argument from some courts such as *Alvarez*, that naming "John Doe" defendants would constitute a sufficient notice of claim[140] undermines the argument behind the *Tannenbaum* approach. The court in *Alvarez* suggested that including "Police Officer John Doe" would put the municipality on notice and satisfy the statute's notice requirements.[141] However, to hold that individual defendants must be named, yet indicate that "John Doe" language may suffice, is contradictory. The inclusion of "John Doe" language provides barely any additional information for a municipality to utilize in an investigation. For example, in a claim against a police department, "John Doe language will not enable the municipality to better identify the arresting officers in the unlikely event the City is unaware of their identities."[142] Receiving the time, place, and manner of the claim places the municipal organization which employs these individuals in a better position, relative to the plaintiff, to discover their identities.[143] Thus, to assert that the inclusion of "John Doe" language would ultimately allow a plaintiff's claim to proceed, when it would otherwise be dismissed, defies common sense.

Although the municipality may experience some form of prejudice from a plaintiff not naming individual defendants in their notice of claim,[144] it is not so significant as to warrant a "do-or-die" requirement on the plaintiff's part. While it is true that

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[138] Blake v. City of New York, 148 A.D.3d 1101, 1106, 51 N.Y.S.3d 540, 545 (2d Dep't 2017) (citing Zwecker v. Clinch, 279 A.D.2d 572, 573, 720 N.Y.S.2d 150 (2d Dep't 2001)).

[139] Brown v. City of New York, 95 N.Y.2d 389, 393, 740 N.E.2d 1078, 1080, 718 N.Y.S.2d 4, 6 (2000); *see also* Rivero v. City of New York, 290 N.Y. 204, 208, 48 N.E.2d 486, 488 (1943) (holding that a notice of claim, which described the exact location of alleged negligence on a public road, "was sufficient to enable the city to investigate the claim of negligence and *nothing more was required*") (emphasis added).

[140] *See, e.g.*, *supra* notes 59, 63, 75 and accompanying text

[141] Alvarez v. City of New York, 134 A.D.3d 599, 605, 22 N.Y.S.3d 362, 366 (1st Dep't 2015).

[142] *Id.* at 609, 22 N.Y.S.3d at 369 (Manzanet-Daniels, J., dissenting) (internal quotation marks omitted).

[143] *See id.*

[144] *See supra* note 63 and accompanying text.

memories may fade and information may be more difficult to obtain, such is true of any prolonged litigation, and the municipality possesses the tools at hand to prevent any delay in investigation.[145] What matters is not that a plaintiff file a notice of claim with "literal . . . exactness," but rather whether "municipal authorities can locate the place, fix the time and understand the nature of the accident,"[146] which can be satisfied absent the naming of particular employees. This is not to say that a plaintiff can bring a suit based on a different theory of liability than that alleged in the notice of claim; however, an adequate notice of claim will allow a municipality to sufficiently investigate a claim and determine whether to settle or proceed with litigation.

C. The Goodwin *Approach Results in Superior Policy Outcomes when Compared to the* Tannenbaum *Approach*

Somewhat overlapping with the purpose behind the statute, the *Goodwin* approach is also preferable to the *Tannenbaum* approach as a matter of policy outcomes. Primarily, the *Goodwin* approach promotes fairness for an individual plaintiff, allowing meritorious claims to proceed. It would be unjust for a claim to be dismissed simply because of a formality, when the notice of claim otherwise complies with General Municipal Law § 50-e. This is especially because, in some instances, it may be impractical for plaintiffs to discover the identities of employees within the ninety-day period.[147] A plaintiff who provides enough context and details for the investigatory process to proceed should not be punished by having his entire claim dismissed for lack of compliance.

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[145] *See* N.Y. GEN. MUN. LAW § 50-e (McKinney 2018). The tools at hand being the time, place, and manner in which the claim arose, as well as the nature of the claim.

[146] Brown v. City of New York, 95 N.Y.2d 389. 393, 740 N.E.2d 1078, 1080, 718 N.Y.S.2d 4, 6 (2000).

[147] Goodwin v. Pretorius, 105 A.D.3d 207, 214, 962 N.Y.S.2d 539, 544 (4th Dep't 2013) (quoting Schiavone v. County of Nassau, 51 A.D.2d 980, 981, 380 N.Y.S.2d 711 (2d Dep't 1976), *aff'd*, 41 N.Y.2d 844, 362 N.E.2d 252, 393 N.Y.S.2d 701 (1977)) ("[o]n a purely practical basis, it is obvious that, uniquely in medical malpractice actions, a potential claimant may be unable to ascertain the perpetrators of the alleged malpractice within the 90–day notice period").

In the 1970s, the New York legislature amended § 50-e "[in response to judicial criticism by] . . . mitigating the harshness of some of its more stringent provisions."[148] Previously, the Court of Appeals highlighted the inequities associated with strict enforcement of § 50-e.[149] Judge Breitel called for "prompt legislative correction of the statute."[150] Rather than serving its intended function, strict reading of service requirements created "a trap to catch the unwary or the ignorant."[151] Thus, the law should serve not to punish unwary plaintiffs who may lack expertise in these matters, but to "avoid obvious abuses."[152]

Stated otherwise, the *Goodwin* approach should prevail because this issue implicates a plaintiff's right to bring a lawsuit. "General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones."[153] Thus, the statute was enacted not to strike down lawsuits that are otherwise valid, but to protect from frivolous claims and nuisance suits. Accordingly, a plaintiff who adequately describes the time, place, and manner of an event presumably has a good-faith claim and deserves their day in court. Similarly, as mentioned in *Goodwin*, statutes involving a "derogation of [a] plaintiff's common law rights" are to be strictly construed in the plaintiff's favor.[154] This principle,

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[148] *Gen. Mun. Law § 50-e: Legislature Liberalizes Notice of Claim Requirements*, 51 ST. JOHN'S L. REV. 222, 222 (1976).

[149] *See id.* at n.105. ("[T]he Court of Appeals, in Teresta v. City of New York . . . acknowledged the inequities which can result from a literal enforcement of § 50-e. In *Teresta*, the Court deemed the City to have waived the notice of claim requirement when it had examined the plaintiff for his alleged injuries and yet failed to object to lack of notice until the eve of trial.").

[150] *Id.* (quoting Murray v. City of New York, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972)) ("Except to the practitioner who is skilled in tort cases or claims against municipalities, it is a mousetrap. Such a statute should provide a greater discretion to give relief from its requirements and, of course, to avoid obvious abuses, set forth the standards for the exercise of that greater discretion . . . .").

[151] *Id.* (quoting Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952)).

[152] *Id.* (quoting *Murray*, 30 N.Y.2d at 121, 282 N.E.2d at 108, 331 N.Y.S.2d at 16).

[153] Se Dae Yang v. New York City Health and Hospitals Corp., 140 A.D.3d 1051, 1052, 35 N.Y.S.3d 350, 352 (2d Dep't 2016) (quoting DeLeonibus v. Scognamillo, 183 A.D.2d 697, 698, 583 N.Y.S.2d 285, 286 (2d Dep't 1992)).

[154] Goodwin v. Pretorius*,* 104 A.D.3d 207, 216, 962 N.Y.S.2d 539, 546 (4th Dep't 2013).

originating in English common law and adopted in state court jurisdictions, can be used, as it was in *Goodwin*, to promote fairness to plaintiffs.[155]

However, this all must be balanced against affording fairness to municipalities who need sufficient information and time to investigate claims. A notice of claim must ensure that a municipality can satisfactorily investigate without facing unfair prejudice that may accrue due to the passage of time.[156] However, concerns over whether a notice of claim without individual employees named would be fair to the city are baseless. It is unlikely that a city would be unable to conduct a prompt investigation after knowing the nature of the claim as well as the time, place, and manner in which the events unfolded.[157] Likewise, it would be difficult for plaintiffs to bring nuisance suits or frivolous lawsuits when there are still several specific requirements needed for an adequate notice of claim. Therefore, the *Goodwin* approach strikes the proper balance by affording fairness to plaintiffs, whose rights need protection, rather than the municipality, who can likely investigate the claim irrespective of whether individuals are named.

D. The Goodwin *Approach is Preferable Based on the Practical Implications of the Two Approaches*

A final way to assess the impact of the *Goodwin* approach compared to the *Tannenbaum* approach is to predict the likely practical results stemming from each option. For example, the *Goodwin* approach would permit more cases to go forward as cases that otherwise would have been dismissed under the *Tannenbaum* approach would proceed. However, it is unlikely that this increase of cases will negatively burden the court system. Tort lawsuits against municipalities are only one type of suit, and, in fact, have declined over the last three years for various reasons.[158] Thus, the *Goodwin* approach does not open the floodgates to a host of new litigation, but rather allows a subset of meritorious lawsuits that otherwise would have been

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[155] *See generally* R. Perry Sentell Jr., *Statutes in Derogation of the Common Law: In the Georgia Supreme Court*, 53 MERCER L. REV. 41 (2001).

[156] *See* 62A N.Y. JUR. 2D *Government Tort Liability* § 382 (2018).

[157] *See* Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 397 (S.D.N.Y. 2013); White v. Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 412, 759 N.Y.S.2d 641, 645 (Sup. Ct. Rensselaer Cty. 2003).

[158] *See supra* note 22 and accompanying text.

dismissed to proceed. Additionally, it is unlikely that frivolous or nuisance lawsuits will persist because the plaintiff still must describe the time, place, and other requirements regarding how the claim arose.[159]

Another practical effect is that the *Goodwin* approach may promote more cooperation between the municipality and the plaintiff. Under the *Tannenbaum* approach, a municipality may be reluctant to ask a plaintiff for additional information supplementing his or her notice of claim. For instance, if a plaintiff fails to name individual employees, a municipality is incentivized to not make plaintiffs aware of this error, as his claims against municipal employees would be destined for dismissal. On the other hand, the *Goodwin* approach may incentivize municipalities to communicate with plaintiffs. Since the plaintiff's claim against individual employees will proceed irrespective of whether individual employees are named in a notice of claim, municipalities are less discouraged from asking plaintiffs to assist in identifying individual defendants if needed for an investigation.

One negative implication associated with the *Tannenbaum* approach is that it might encourage excessive naming on the plaintiff's part. A plaintiff may not be able to ascertain the names of the alleged tortfeasors.[160] When unsure about employees' identities, a plaintiff may err on the side of caution and name every police officer, for example, that he can discover through the internet and other sources. Such an action would place a burden on the municipality, namely, the municipality would have to use resources not otherwise expended in sorting through excessive naming. This would cause confusion at the outset of the investigatory process.

Alternatively, one may question whether one approach has any advantageous practical effects over the other approach at all, in a typical case. Under the *Goodwin* approach, plaintiffs do not have to worry about naming individual defendants, yet the plaintiffs who easily can will likely name them regardless. Also, in most cases, whether the defendants are named or not, a municipality will be able to discern enough information about the event because of the requirements that General Municipal Law § 50-e directly imposes. However, in many cases, the practical

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[159] *See* discussion *supra* Part III.C.

[160] *See* Goodwin v. Pretorius, 105 A.D.3d 207, 214, 962 N.Y.S.2d 539, 544 (4th Dep't 2013).

outcome—whether a case will be dismissed or not—is of vital importance.[161] Thus, the practical effects stemming from the *Goodwin* approach are also beneficial.

IV. A PROPOSED AMENDMENT DOES NOT EFFICIENTLY SOLVE THE NAMING ISSUE

A. Pending Legislation: An Attempt to Compromise the Two Views

In 2017, New York State Senator Kathleen A. Marchione introduced a bill addressing the exact notice of claim naming issue that resulted in the split of authority between the First Department and the Second, Third, and Fourth Departments outlined in Part II.[162] Entitled "Relates to services of certain notices of claim," the bill addresses both a service issue and the relevant naming issue.[163] The bill proposes to add the following language to New York General Municipal Law § 50-e(1)(b) regarding the naming issue:

> If an action or special proceeding is commenced against such person and against the public corporation itself, the notice of claim need not identify the person by name unless: (1) the plaintiff knew or with due diligence could have discovered the person's name within the time allotted for service of the notice of claim; and, (2) the failure to identify the person by name prejudiced the public corporation in its investigation of the claim. Nothing in this paragraph shall affect the claimant's rights as against the public corporation.[164]

Thus, the amendment would create a default in which a defendant's name is not required. However, naming would be required both when naming is reasonably possible and the municipality would be prejudiced without doing so. Specifically, the amendment assesses whether "the plaintiff knew or with due diligence could have discovered" the municipal employee's

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[161] *See* New York State Unified Court System, *supra* note 1.

[162] 2017 N.Y. S.B. 5097, 240th Legis. Sess. (N.Y. 2017). The bill was introduced into the Committee on Senate Local Government on March 8, 2017. After going through several readings and passing the committee stage, it was placed on the senate floor calendar on March 27, 2017. After the bill advanced to the Committee on Senate Rules on June 21, 2017, the bill was later referred back to the Committee on Senate Local Government on January 3, 2018, failing to advance further.

[163] *Id.*

[164] *Id.*

name.[165] If satisfied, and the municipality can show that it was prejudiced in its investigation, the naming requirement will be imposed.

In the Committee Report accompanying the bill, Senator Marchione explained her rationale behind the amendment, calling it a "compromise" between the *Tannenbaum* approach and the *Goodwin* approach.[166] The Committee Report claims that the amendment "strikes a sensible and fair balance between competing concerns, and . . . it recognizes that the public corporation is best situated to show that it was prejudiced (as opposed to the plaintiff having to prove the negative)."[167]

B. The Proposed Amendment Does Not Efficiently Solve the Naming Issue

While the amendment seems to directly address the problem it does so superficially and in fact raises more issues and creates inefficiencies. Most notably, Senator Marchione's proposed amendment suffers from many of the same deficiencies as the *Tannenbaum* approach. For example, examining the purpose behind a notice of claim, a municipality has the tools to adequately investigate a claim against it without any naming requirement.[168] Similarly, a notice of claim should not serve to punish plaintiffs who fail to list names when they otherwise provide information that would allow a municipality to investigate a claim against it.[169] The amendment would also lead to undesirable practical outcomes, such as a lack of cooperation between the parties and excessive naming on the part of the plaintiff.[170]

Additionally, Senator Marchione's proposed amendment over-complicates the issue by essentially creating a de facto naming requirement for the plaintiff. Since the plaintiff will be charged with anything he could have discovered, it places responsibility on the plaintiff to exercise due diligence in naming. While the amendment is framed such that naming is not required unless the elements are met, it practically becomes a requirement for plaintiffs to name the employees or exhaust all

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[165] *Id.*
[166] S. 239-5097, 2017-2018 Regular Sessions (N.Y. 2017).
[167] *Id.*
[168] *See* discussion *supra* Part III.B.
[169] *See* discussion *supra* Part III.C.
[170] *See* discussion *supra* Part III.D.

reasonable possibilities looking for their names in order to avoid the threat of dismissal. Moreover, there is an additional burden on the municipality who now must produce evidence of the prejudice that it experienced. Showing whether a plaintiff has knowledge or exercised due diligence, and whether a municipality was prejudiced, would lead to a trial within a trial.

Similarly, Senator Marchione's proposed amendment is inefficient and creates several problems that will result in additional litigation. First, the amendment would require courts to dive into the plaintiff's subjective knowledge or what the plaintiff could have discovered with due diligence.[171] While knowledge may be clear in some instances, this unsettling proposition would lead to additional disputes as to what constitutes due diligence under the circumstances and whether a plaintiff could have discovered the defendant's names.

Moreover, forcing the municipality to show whether it has been prejudiced is equally problematic. For example, there are open questions about the extent of prejudice a municipality would need to allege in order to force a plaintiff to name defendants. Thus, the bill raises more questions than it answers.

While the amendment attempts to strike a balance between the two approaches, it would lead to complicated results and is not an efficient way to solve this issue. The *Goodwin* approach remains the preferred solution to this problem.

CONCLUSION

The most compelling argument is that New York General Municipal Law § 50-e does not mandate the naming of individual municipal employees in a notice of claim. The reasoning for the *Tannenbaum* approach originating from *White* is unpersuasive. Looking at the text of § 50-e(2), listing individual names is absent from the statute, which carries a presumption that the legislature intended to exclude such language. Moreover, the approach set forth in *Goodwin* is aligned with the purpose behind notice of claim requirements. And various policy concerns and practical implications render the *Goodwin* approach superior. Finally, the proposed amendment, which attempts to compromise the two approaches, does not efficiently or logically solve the notice of claim issue.

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[171] 2017 N.Y. S.B. 5097, 240th Legis. Sess. (N.Y. 2017).

Given the financial liability stemming from municipal tort lawsuits, as well as the consequences if plaintiffs fail to comply with notice of claim requirements, New York and federal courts should adopt the *Goodwin* approach moving forward. Thus, the New York Court of Appeals should resolve the split of authority in favor of the Second, Third, and Fourth Departments.